89-185

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMANN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTIONAL STATEMENT

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, New Jersey
07041
(201) 762-5587

QUESTIONS PRESENTED

1. Whether New Jersey's Wrongful Death statute, N.J.S.A. 2A:31-2, as written and applied to plaintiff, violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action; if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.*

2. Whether the Final Order of the New Jersey Supreme Court dismissing the appeal in this matter and the order of dismissal and 1986 judgment of the Appellate Division of the Superior Court of New Jersey rest on adequate and independent state grounds, thus depriving the U. S. Supreme Court of jurisdiction.

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* This phrasing of the federal question is virtually identical to the Appellate Division's version in its 1986 remand decision. (See: App. H, infra, p. 13a).

PARTIES TO THE PROCEEDING

JOHN R. CONNOR, Appellant pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

R.G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMAN, JR., M.D., Appellees

Shanley & Fisher, P.C., for Appellees
(Thomas J. Alworth, Esq.)

OVERLOOK HOSPITAL, Appellee

McDonough, Murray & Korn, for Appellee
(Robert J. Logan, Esq.)

STATE OF NEW JERSEY *

Attorney General of New Jersey
Office of the Attorney General
Hughes Justice Complex
Trenton, New Jersey 08625

(James J. Ciancia,
Assistant Attorney General)

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* Noticed of Appellant's challenge to the constitutionality of N.J.S.A. 2A:31-2, in accordance with New Jersey Rule 4:28-4. Attorney General first noticed of constitutional issue on November 21, 1985.

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IN THE

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OCTOBER TERM, 1988

In the matter of

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

JURISDICTION

John R. Connor, Appellant pro se, appeals from the Final Order of the Supreme Court of New Jersey entered in this matter on May 4, 1989 (App. A, infra, p. 1a), which denied

Appellant's petition for certification and dismissed Appellant's appeal from the December 13, 1988 final order of the Appellate Division of the Superior Court of New Jersey (App. C, infra, p. 4a) which, in turn, dismissed Appellant's appeal from the May 16, 1989 final order of the trial court dismissing the within Wrongful Death action, with prejudice. (App. D, infra, p. 6a).

A Notice of Appeal to this Court was timely filed in the New Jersey Supreme Court on July 14, 1989 (App. Z, infra, p. 47a) and also with the Appellate Division on July 21, 1989, both courts being in possession of parts of the record.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2). Chapman v. Crane, 123 U.S. 540 (1887), Cohen v. Virginia, 6 Wheat. 264 (1821), Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561 (1905) and Enterprise Irrig. Dist. v. Canal Co.,

243 U.S. 157 (1916) sustain the jurisdiction of this Court to review by appeal the Final Order of the New Jersey Supreme Court and the 1986 remand decision of the Appellate Division of the Superior Court of New Jersey in this case. The opinions are not reported.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> . . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Constitution (1947), Article 6, Section 5, Paragraph 1 provides in part:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * * *
>
> (d) On certification by the Supreme Court. . .

N.J.S.A. 2A:31-2 provides:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

N.J. Sup. Ct. C.P.R. 2:2-1(a) provides in part:

> Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State. . .

N.J. Sup. Ct. C.P.R. 2:2-1(b) provides in part:

> Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

STATEMENT OF THE CASE

The present appeal by plaintiff constitutes the second appeal in this action to the U. S. Supreme Court, the first having been dismissed in 1987 "for want of jurisdiction." (App. T, p. 36a).[1] Before recounting the procedural history of this case since it was last before the Court, plaintiff will restate, for the record, the underlying, operative facts which gave rise to this lawsuit.

Plaintiff John R. Connor is the son of decedent Mary A. Connor, who passed away on November 24, 1977 at Overlook Hospital in Summit, New Jersey. Mrs. Connor, who was suffering from an undiagnosed condition of pancreatitis, died as a result of cardiac shock following unnecessary exploratory surgery. Under the terms of her will, plaintiff

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[1] Connor v. Sachs, et als, cert. den. ___U.S. ___, reh. den. ___U.S.___(1987).

was appointed executor, however, by virtue of a provision in the 1979 judgment admitting the will to probate, plaintiff was prohibited from serving as executor.[2]

In 1978, the Superior Court of New Jersey appointed an Administrator (Warren) to represent the estate, after erroneously finding that "Mary A. Connor, late of the County of Essex and State of New Jersey, died * * * intestate. . ." (App. I, p. 16a). (Emphasis added).

While plaintiff was in the process of appealing the Warren appointment,[3] the Administrator, on September 21, 1978, secured a warrant for plaintiff's arrest for an alleged contempt in connection with the estate. The warrant was never executed, but was replaced on January 4, 1979 with a Supplementary Warrant which was executed eight months later, on September 23, 1979, at which time plaintiff

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[2] Connor v. Phillips, cert. den. 455 U.S. 991, reh. den. 456 U.S. 939 (1982).

[3] Connor v. Warren, cert. den. 449 U.S. 1079 (1981).

was arrested and incarcerated in the Essex County jail for 4 days and only released upon his agreement to surrender possession of his mother's will to the Administrator. The contempt was quietly dropped by the court. However, while decedent's will was forcibly taken from plaintiff on September 26, 1979, this document was not immediately probated by the Administrator. In fact, the probate hearing was not scheduled until November 14, 1979, and the judgment granting probate (which simultaneously removed the Administrator and appointed an Administrator, C.T.A.) was not signed by the court until December 3, 1979. On November 24, 1979, a date precisely in between the November 14th probate hearing and the filing of the probate judgment on December 4, 1979 - the two-year period in which a Wrongful Death action had to be filed was due to expire.

Consequently, on November 15, 1979, plaintiff wrote the Administrator and demanded

that he promptly file a complaint for the wrongful death of his mother. (App. K, p. 20a). In his letter of November 16th, Administrator Warren communicated his refusal to file the suit, as a result of which plaintiff, himself, filed the complaint in this action. (App. L, p. 21a). The complaint is framed, in part, in plaintiff's own right and, in part, in right of the Administrator for those parties beneficially interested.

* * * * *

The earliest phase of this litigation encompassed discovery by the parties. Since 1980, defendants had filed several motions to dismiss this action on the ground that plaintiff lacked "standing" under N.J.S.A. 2A:31-2, which specifically provides that only an Executor or Administrator, C.T.A., can prosecute a wrongful death action where a decedent dies testate. Defendants' last such motion succeeded on February 10, 1984, giving rise to plaintiff's first (1987) appeal to the Supreme Court.

(App. Q, p. 30a).

Prior to the first (1984) dismissal of this suit, the trial court (located in Union County, New Jersey) ordered plaintiff to apply to a different court for letters ad prosequendum: first, to the Surrogate of Essex County (decedent's resident county) and, next, to the Probate Part of the Superior Court of New Jersey in Essex County. (App. M, p. 23a; App. O, p. 27a). Both applications were denied. In the latter case, plaintiff's show cause papers were not even filed, but returned with an explanation that "[t]he law of the State of N. J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate." (App. N, p. 25a; App. P, p. 29a).

Plaintiff next moved before the trial court in Union County for letters ad pros, which application was denied by the trial court on June 7, 1983. (App. O, p. 27a). Following the February 10, 1984 dismissal of

this action by the trial court, plaintiff next appealed to the Appellate Division of the Superior Court of New Jersey.

Two years later, on May 29, 1986, the Appellate Division issued a per curiam opinion which reversed the dismissal and remanded the case for further proceedings. (App. H, p. 11a). In its opinion, the appellate court defined, but did not decide, the constitutional issue raised by plaintiff:

> We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates. If a decedent has died testate, only the executor or administrator c.t.a. may prosecute a wrongful death action on behalf of his estate; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

Id., at 13a. The Appellate Division then remanded the case "to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute

as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum." Id., at 14a.

Plaintiff's motion for reconsideration of the remand terms was denied by the Appellate Division on July 1, 1986 (App. G, p. 10a). An appeal to the New Jersey Supreme Court was dismissed without explanation on December 18, 1986 (App. F, p. 9a) and a motion for reconsideration was denied on January 26, 1987. (App. E, p. 8a). As previously stated, the U. S. Supreme Court declined to entertain plaintiff's first appeal and denied a petition for rehearing on August 26, 1987. (App. U, p. 37a). At all stages of this litigation, plaintiff has challenged the constitutional validity of N.J.S.A. 2A:31-2 on equal

protection grounds, as written and applied to himself, and has attempted to void the Appellate Division's terms of remand.

* * * * *

During the pendency of plaintiff's first appeal to the New Jersey Supreme Court (and before the trial court entered a stay to permit plaintiff's first appeal to the U. S. Supreme Court), the trial court, on September 12, 1986, entered an order granting summary judgment and dismissing the complaint in this action as to defendant Overlook Hospital because of plaintiff's "failure to comply with the [remand] decision of the Appellate Division filed on May 29, 1986." (App. R, p. 32a). The court found that plaintiff, by not complying with the remand, "has waived and is estopped from any further claim of standing in this matter by its own conduct." (App. S, p. 35a).

* * * * *

Following the U. S. Supreme Court's denial

of plaintiff's petition for rehearing on August 26, 1987, plaintiff sent two letters to the attorney (Watson) for the Administrator C.T.A. in an attempt to ascertain the latter's address. (App. V, p. 38a and App. W, p. 39a). Neither letter received a response. Finally, on September 24, 1987, plaintiff hand-delivered a letter to the Administrator (Phillips) who, as investigation unearthed, shared an office with attorney Watson. The letter stated:

> So that there is no misunderstanding my position, I herein request that you decide not to substitute for me as plaintiff in this litigation, as it will probably create a limitations problem. Furthermore, inasmuch as you remain in privity with your predecessor administrator, George Warren, you would consequently be bound by his 1979 refusal to file this suit.

(App. X, p. 40a).

Plaintiff next moved before the trial court to have N.J.S.A. 2A:31-2 declared unconstitutional and for receipt of letters ad pros. The Administrator, C.T.A., who had

received notice of plaintiff's motion, neither responded to same nor did he appear at oral argument. The trial court proceeded to dismiss the complaint as to the remaining defendant-physicians, with prejudice, and, in a letter opinion, based its decision on plaintiff's failure to comply with the Appellate Division's terms of remand - specifically, plaintiff's failure to request the Administrator's substitution as plaintiff. (App. Y, p. 42a).

Plaintiff appealed the trial court's second dismissal of this suit to the Appellate Division of the Superior Court of New Jersey. Merits briefs were filed by the parties and, in addition, defendant Overlook Hospital moved for dismissal as to itself on the jurisdictional ground that it was no longer a party to the case. The hospital's motion was made under R. 2:8-2, which rule permits the appellate court to dismiss an appeal because of

procedural or technical defects in the appeal, itself.[4]

By its order filed December 13, 1988 (App. C, p. 4a), the Appellate Division dismissed the appeal as to all parties, stating:

> The decision is now final as to all parties and issues. Clearly, appellant has not complied with the options afforded in our May 29, 1986 opinion in Docket No. A-3491-83. Moreover, that opinion is fully binding on all the parties.

Id., at 5a.

On January 3, 1989, plaintiff met with Beverly Geschlect, Staff Attorney with the Appellate Division, and she informed plaintiff that his entire appeal had been dismissed on the basis of the motion papers and that the merits briefs had not been forwarded to the court. Plaintiff also reviewed the court's file and discovered a "Post-it" note attached to the Order of Dismissal in the file, itself. It read: "D/G/M/Dismiss on substantive grounds;

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[4] Pressler, New Jersey Rules With Comments, p. 388 (1988).

see order for holding (JJP). Close A as dismissed." (App. C, p. 5a).

Plaintiff next filed both a petition for certification and an appeal with the New Jersey Supreme Court. The petition was denied and the appeal dismissed by the court, without comment, in its order filed May 4, 1989. (App. A, p. 1a).

Prior to the Supreme Court's disposition of this action, plaintiff visited the clerk's office and discovered that the parties' Appellate Division merits briefs and appendices, which are required by R. 2:12-7(b) to be filed with the Clerk of the Supreme Court,[5] were only marked "Received" but not "Filed." Plaintiff timely moved to compel the Clerk to file the Appellate Division briefs and appendices, but the case was dismissed before the motion was decided. Eventually, the

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[5] Within 10 days after filing of the notice of petition for certification * * * 9 copies thereof together with 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. R. 2:12-7(b).

Court dismissed the motion as moot, stating:

> . . .it is ORDERED that the motion to require the Clerk to mark as "file" Appellate Division briefs received in the Supreme Court is dismissed as moot, certification having been denied (C-966-88). The record before the Court on the petition included the Appellate Division briefs and Appendices of the parties pursuant to Rule 2:12-6.

(App. B, p. 3a). Notwithstanding the missing "d" in the word "file," R. 2:12-6[6] simply defines the record on a petition, while R. 2:12-7(b) mandates the "filing" of the parties' Appellate Division briefs and appendices.

It is also remarked at this point that neither of the two orders recently issued by the New Jersey Supreme Court, which are at issue in this appeal, have been signed by the Chief Justice Robert N. Wilentz. Plaintiff has filed a motion with the court to correct

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[6] The record on petition for certification shall be the briefs, appendices and transcripts filed in the Appellate Division and the opinion of the Appellate Division, and such record shall constitute the record on appeal if certification is granted. R. 2:12-6.

this omission, based on R. 2:13-1(a), which requires that:

> The Chief Justice * * * shall preside over sessions and conferences of the court and shall sign all orders and other papers on behalf of the court.

(Emphasis added).

* * * * *

The federal question presented in this appeal, which involves a challenge to the constitutionality of New Jersey's Wrongful Death statute, N.J.S.A. 2A:31-1, has been raised by plaintiff at each stage of this litigation since its inception. In 1983, in response to defendants' dismissal motion, plaintiff filed a cross-motion for a declaratory judgment adjudging the statute in violation of the Equal Protection Clause of the Fourteenth Amendment. That cross-motion was not decided by the trial court when it first dismissed this action in 1984. (App. Q, p. 30a).

In its May 29, 1986 decision, the Appellate

Division stated, but declined to decide, the constitutional question. (App. H, p. 13a). The same question, albeit in slightly different form, was presented by plaintiff to both the New Jersey Supreme Court and the U. S. Supreme Court.

Upon remand to the Law Division of the Superior Court of New Jersey, the trial judge, Barbara Byrd Wecker, J.S.C., specifically denied plaintiff's renewed cross-motion challenging the constitutionality of N.J.S.A. 2A: 31-2. (App. D, p. 7a). On appeal to the Appellate Division, that court did not per se discuss the issue, except implicitly, when it ruled that "[t]he decision below is now final as to all parties and issues." (App. C, p. 5a) (emphasis added). The New Jersey Supreme Court, in dismissing plaintiff's petition for certiorari and appeal, refused to entertain the constitutional question which is now, once again, before the U.S. Supreme Court for review in this appeal. (App. Z, p. 47a)

A F F I D A V I T

State of New Jersey)
) SS:
County of Essex)

Appeared before me John R. Connor, of full age, who, first being sworn upon his oath, deposes and says that:

1. The facts stated by me in the foregoing STATEMENT OF THE CASE are true and correct. Specifically, the account of my conversation with Beverly Geschlect, Staff Attorney with the Appellate Division on January 3, 1989 is true.

.....
(Signature of Affiant)

Sworn to and subscribed before me
this 3rd day of July, 1989

Notary Public

KAREN RAU
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 29, 1992

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Whether N.J.S.A. 2A:31-2, as written and applied to plaintiff, violates the Equal Protection Clause of the Fourteenth Amendment because of its differing standards for who may bring claims on behalf of the beneficiaries of a death action: if a decedent has died testate, only the executor or administrator, c.t.a., may prosecute a wrongful death action; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The federal question in this case, whether New Jersey may bar an interested beneficiary from filing a Wrongful Death action, after an Administrator's refusal to file the suit, where there is a testacy, is a new and substantial question which has never previously been decided either by New Jersey courts or the U. S. Supreme Court.

N.J.S.A. 2A:31-2, the statute at issue in this appeal, governs who may prosecute a

wrongful death action:

> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate, and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

(Emphasis added).

The class of individuals which is entitled to recover damages under the statute are those "persons entitled to take any intestate personal property of the decedent. . ." N.J.S.A. 2A:31-4. (Emphasis added). Consequently, the right to recover damages caused by an offense is a property right of an interested beneficiary within the protection of the Fourteenth Amendment:

> An action for wrongful death is brought for the exclusive benefit of the persons entitled to take intestate property of the decedent. N.J.S. 2A:31-4. The administrator ad prosequendum is merely a nominal representative of the class mentioned since

> he acts as fiduciary for the general administrator who is charged with distribution of the funds recovered.

Glucksman v. Strelecki, 102 N.J. Super. 53, 58 (Law Div. 1968). (Emphasis added).

Historically in New Jersey, Wrongful Death actions were required to be brought in the name of the personal representative of the deceased. 2 Comp. Stat. 1904-1908, §8. However, the 1917 supplement to the Death Act provided for the institution of such actions in the name of an administrator ad prosequendum, where the decedent died intestate. Pamph. L. 1917, ch. 180, p. 531. In ascertaining the purpose of the 1917 supplement, the New Jersey Court of Errors and Appeals later found that: "[s]uch representative ad prosequendum seems to be required only for the purpose of providing some person to prosecute the action. . . ," Loughney v. Thomas, 117 N.J.L. 169, 172 (E. & A. 1936), and that such an administrator is "a mere trustee to bring and conduct the action." Id., at 173.

(Emphasis added).

Heretofore in New Jersey, N.J.S.A. 2A:31-2 has been strictly construed to prohibit any person, other than an executor or administrator, c.t.a., from prosecuting a Wrongful Death action, where the decedent dies testate. "No administrator ad prosequendum will be appointed to prosecute a death action where the decedent dies testate. An executor or administrator with the will annexed must prosecute the action." 8 Clapp, New Jersey Practice, Wills and Administration §716 at 351 (1987). In Schueler v. Strelinger, 43 N.J. 330 (1964), the New Jersey Supreme Court specifically held that a father had no individual right of action under the Death Act for pecuniary loss as a result of his daughter's death, but that such cause of action "must be brought by an administrator ad prosequendum in case of intestacy, or by an executor where (as here) the decedent left a will." Id., at 349. (There is no New Jersey case that deals with

the factual situation of a "testate" beneficiary bringing a death action upon the fiduciary's refusal to file suit.)

Where, however, a decedent dies intestate, any person beneficially interested may receive letters ad prosequendum. N.J.S.A. 3B:10-11 (formerly N.J.S.A. 3A:6-13), which implements N.J.S.A. 2A:31-2, allows issuance of letters ad prosequendum "to the person entitled by law to general administration" (either "surviving spouse," the "remaining heirs" or to "any other person as will accept the administration"). In point of fact and practice, "[t]hese letters may be obtained not only in an action instituted by the widow or next of kin as plaintiff * * * but also in an action instituted by any interested person." Clapp, supra, at 350 n. 1 (1987).

Consequently, N.J.S.A. 2A:31-2, as written and applied, creates a dual office for the prosecution of wrongful death actions for

intestate decedents (General Administrators, who receive and distribute the proceeds and Administrators Ad Prosequendum, who prosecute the death action as trustee for the class). Members of the several groups within the class who are eligible to receive letters where there is an intestacy ("spouse," "next-of-kin" and "interested persons") however, are per se barred from receiving letters under the statute where the decedent died testate and even in the event of the fiduciary's refusal to file the death action.

Consequently, where there is an intestacy, full opportunity exists for a Wrongful Death suit to be filed where an administrator fails or refuses to prosecute the action. No similar alternative remedy is provided in the event of testacy, however, because the fiduciary has the exclusive right to bring the death action under New Jersey law.

Thus, a strict construction interpretation of N.J.S.A. 2A:31-2 (as applied against plain-

tiff herein) not only invidiously discriminates against the class in a testacy, and in the event of a refusal-to-file by the fiduciary, but also its per se exclusion from letters ad prosequendum is entirely "arbitrary" because the exclusion depends solely on the irrelevant criteria of whether decedent left a will.

* * * * *

A brief review of applicable precedent indicates that N.J.S.A. 2A:31-2 violates the Equal Protection Clause, as written and applied to plaintiff.

As long ago as 1903, the Supreme Court held that the equal protection "provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed." Field v. Barber Asphalt Co., 194 U.S. 618, 621-622 (1903). See also: Reed v. Reed, 404 U.S. 71, 75, 76 (1971). In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1910),

the Court, while affirming the wide scope of a state's discretionary power to classify for legislative purposes, stated:

> A classification having some reasonable basis does not offend against that [Equal Protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

Id., at 78. (Emphasis added). See: Dandridge v. Williams, 397 U.S. 471, 485 (1969). However, the classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia 253 U.S. 412, 415 (1919). See also: Louisville Gas Co. v. Coleman, 277 U.S. 32 (1928). "Under our constitutional system the States in determining the reach and scope of particular legislation need not provide 'abstract symmetry' * * * 'the Constitution does not

require things which are different in fact or opinion to be treated as though they were the same' * * * 'the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as the means allows.' " Skinner v. Oklahoma, 316 U.S. 535, 539-540 (1941). (Emphasis added).

In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court stated: "[s]tatutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." Id., at 732. Applying the test enunciated in Royster Guano, supra ("all persons similarly circumstanced shall be treated alike"), the Court found unconstitutional a Massachusetts statute that made it a felony for anyone to distribute contraceptives, except by a registered physician or pharmacist, and then only to a married person. The Court, in applying the

rational basis test, found that "[e]nforcement of the * * * statute will materially impair the ability of single [unmarried] persons to obtain contraceptives." Eisenstadt v. Baird, 405 U.S. 438, 446 (1972). In other words, a "whole class of persons was excluded from the benign regulatory scheme." Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123, 126 (1972).

The classic interpretation of equal protection theory in Tussman and ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949), affords clarification as to determining whether a classification is "reasonable":

> The essence of that [reasonable classification] doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

* * *

> . . .where are we to look for the test of similarity of situation which determines reasonableness of a classification? The inescapable answer is that we must look beyond the classification to the purpose of the law.

The purpose of New Jersey's Wrongful Death statute is defined in N.J.S.A. 2A:31-1 which states that an action lies "[w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury. . ." See: United New York & N.J.S.H.P. Asso. v. Halecki, 358 U.S. 613 (1959) (New Jersey's Wrongful Death Act gives a right of action for negligently caused death).

Under the aforementioned criteria, N.J.S.A. 2A:31-2, as written and applied to plaintiff, is "invidiously" discriminatory because it does not treat alike all beneficiaries similarly situated ("spouse," "next-of-kin," and

"person interested") with respect to the purpose of the statute. This is not merely a situation betraying "some inequality," Lindsley, supra, but rather a total inequality where members of the aforesaid class only possess the right to prosecute death actions in the event of an intestacy, and not at all where the decedent dies testate - or even when the fiduciary refuses to file a death suit. As such, the arbitrary classifications of New Jersey Wrongful Death Statute, N.J.S.A. 2A:31-2, as written and applied, fall precisely within the Supreme Court's prohibition enunciated in The Tungus v. Skovgaard, 358 U.S. 588 (1959), when in commenting on New Jersey's Wrongful Death Act, it stated: "it is incumbent upon a court enforcing that policy to enforce it all, and the court may not pick or choose." Id., at 593.

By arbitrarily "picking and choosing" those within the class who may receive letters ad

prosequendum, N.J.S.A. 2A:31-2 does not treat alike all persons similarly situated. And because of the dissimilar treatment provided for persons who are entitled to damages, the challenged statute violates the Equal Protection Clause.

* * * * * *

The substantiality of the federal question in this appeal is evidenced by the New Jersey Supreme Court's ruling in the case of Schmoll v. Creecy, 54 N.J. 194 (1969). In Schmoll, supra, the trial court had found that illegitimate children could not recover damages under the Wrongful Death statute. In reversing for the children, the court inquired: "whether it is arbitrary to provide a [damages] remedy for a legitimate child and to deny a like remedy to an illegitimate child who sustained precisely the same injury." Id., 38 ALR 3d at 609.[7]

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[7] In interpreting N.J.S.A. 2A:31-4, the damages section of the Wrongful Death statute, the

While the within appeal doesn't deal with the issue of illegitimacy, but rather with the threshold question of standing-to-sue, this question can be easily rephrased to apply to the within case:

> Whether it is arbitrary to provide a remedy for an interested beneficiary of an intestate decedent and to deny a like remedy to to the interested beneficiary of the testate decedent who sustained precisely the same injury?

* * * * * *

In contrast to New Jersey, the Wrongful Death statutes in some states specifically make allowance for the contingency when the personal representative fails or refuses to prosecute the suit. For example, Pennsylvania

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State Supreme Court relied on the Supreme Court's decision in Levy v. Louisiana, 391 U.S. 68 (1967) which held Louisiana's death statute (La. Civ. Code Art. 2315) unconstitutional as construed to deny a right of recovery by illegitimate children, because it created an invidious discrimination contravening the Equal Protection Clause.

provides that "an action for wrongful death shall be brought only by the personal representative of the decedent. . ." Pa.R.Civ.P. §2202(a). However, in the event the personal representative fails to institute suit within six months of the decedent's death, then any person entitled by law to recover damages may sue on his own behalf. Pa.R.Civ.P. §2202(b). See: Beascoechea v. Sverdrup & Parcel and Assoc., Inc., 486 F. Supp. 169 (D.C. Pa. 1980).

In Cudney v. United Power & L. Corp., 142 Kan. 613 (1935), the Kansas Supreme Court interpreted a statute allowing a beneficiary to sue when no personal representative had been appointed, to apply to the situation where a qualified administratrix had been discharged without prosecuting the wrongful death action.

In Harris v. Rex Coal Co., 177 Ky. 630 (1917), the Court of Appeals of Kentucky held that the mother of the decedent had the right to start a death action where an administrator attempted some sort of fraudulent settlement

with the party responsible for the decedent's death. "This she had a right to do upon the refusal of the administrator to sue, although the right of action was * * * originally in him." Id., 197 S.W. at 1075. (Emphasis added). This exception was upheld as recently as 1978 by the Supreme Court of Kentucky which ruled that: "[c]ontrary to the requirements of KRS 411.130, when a personal representative refuses to bring an action, the beneficiary may do so in her own name." Wheeler v. Hartford Acc. & Indem. Co., 560 S.W.2d 816 (Ky. 1978).

In Bailes v. Southern Railway Company, 227 S.C. 176, 87 S.E.2d 481 (1955), the Supreme Court of South Carolina allowed a beneficiary to maintain a wrongful death action under circumstances where the brother's administrator had schemed to defraud the beneficiaries by settling the death claim for $450 without their knowledge and consent, and the administrator refused to file the death action.

The statute provided that "an action for wrongful death 'shall be brought by or in the name of the executor or administrator,' " id. at 483, however, the court predicated its exception on the Law of Trusts:

> If a trustee refuse, after demand, to bring action in behalf of the trust estate or the beneficiaries thereof, or if he has an adverse interest or has conspired to defeat the trust, the beneficiary may himself bring the action against the third person, joining the trustee as a defendant. In doing so, the beneficiary is not enforcing his own cause of action, but is acting as a temporary representative of the trust. Bogert, Trusts and Trustees, Section 870, page 461; 54 Am. Jur. Trusts, Section 591, page 457 * * * The rule, which is frequently cited in other instances of trusteeship, is no less applicable where the trust relationship is that between an executor or administrator and the beneficiaries of a cause of action for wrongful death.

Id., 87 S.E.2d 484. (Emphasis added).

These decisions from the highest courts of other states are directly contra to the result in the within case. The outcome is especially anomalous in view of New Jersey's

adherence to the exception to the general rule allowing beneficiaries to file suit when a trustee fails or refuses to prosecute suits. See: Buchanan v. Buchanan, 75 N.J. Eq. 274, 71 A. 745, 746 (E. & A. 1909); Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284, 4 A.2d 794, 797 (Ch. Ct. 1939).

The Supreme Court of New Jersey is not unfamiliar with the practice, necessity and advantage of utilizing judicial interpretation to avoid equal protection problems:

> In Schmoll, we interpreted the wrongful death statute to permit illegitimate children to recover despite the lack of any such provision in its explicit language and with knowledge that several amendments to place such a provision in the act failed to achieve passage. This construction was necessary to save the statute from constitutional infirmity as it otherwise would have denied equal protection guarantees.

State v. Zarinsky, 75 N.J. 101, 113 (1977). Under this rationale, it's apparent that N.J.S.A. 2A:31-2 allows ample scope for

a judicial interpretation that would permit an interested beneficiary to act when an (intestate) Administrator, in possession of decedent's unprobated will, refused to file the death action.

* * * * *

B. Whether the Final Order of the New Jersey Supreme Court dismissing the appeal in this matter and the order of dismissal and 1986 judgment of the Appellate Division of the Superior Court of New Jersey rest on adequate and independent state grounds, thus depriving the U. S. Supreme Court of jurisdiction.

The U. S. Supreme Court early established the rule that: "a right or immunity set up or claimed under the Constitution * * * may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right * * * as if

it had been specifically referred to and the right directly refused." Chapman v. Crane, 123 U.S. 540, 548 (1887). In such a case, it is the "duty of the United States Supreme Court to ascertain * * *'whether the nonfederal ground independently and adequately supports the judgment.' " National Asso. for Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. 449, 455 (1958). The federal right must have been either expressly denied by the state court or "by necessary effect, decided by that court against the plaintiff-in-error." San Francisco City and County v. Itsell, 133 U.S. 65, 66 (1889). More particularly, that "the judgment could not have been rendered without denying [the federal claim]." Western U. Teleg. Co. v. Wilson, 213 U.S. 52, 53 (1908). And, "[w]here it appears that some title, right, privilege or immunity on which recovery depends, will be defeated by one construction of the Constitution * * * or sustained by the

opposite construction, the case is one arising under the Constitution. . ." Cooke v. Avery, 147 U.S. 375 (1893). As such, the U. S. Supreme Court can "properly exercise appellate power over those judgments of the state tribunals which contravene the Constitution and laws of the United States." Cohen v. Virginia, 6 Wheat. 264 (1821).

The constitutional question in this case was defined by the Appellate Division in its 1986 remand decision (App. H, p. 13a), albeit that court declined to decide same, electing instead to decide not a single issue raised on appeal, but to remand the case to:

> ...provide an opportunity to plaintiff, within 30 days of the date of our remand, to request [Administrator, C.T.A.] Phillips to substitute as party plaintiff * * * and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

(App. H, p. 14a).

These terms, which plaintiff decided not to carry out (App. X, p. 40a), constitute a novel procedural device whose intended result was to provoke a "waiver" of plaintiff's federal claim in this case. Plaintiff declined to "request" the Administrator C.T.A.'s substitution as party-plaintiff for several important legal reasons: first, such conduct on plaintiff's part would undoubtedly trigger a waiver of his federal claim to "standing" and automatically propel Phillips into the suit as party-plaintiff.

That the Appellate Division is alert to consequences of waivers is evident from its decision in the case of Sturdivant v. General Brass & Machine Corp., 115 N.J. Super. 224 (App. Div. 1971):

> It has been broadly asserted that any act on the part of a party by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it, and clearly one who voluntarily acquiesces in

> or ratifies a judgment against him cannot appeal from it. The acquiescence which prohibits an appeal, or destroys it when taken, is the doing or giving of the thing which the decree commands to be done or given.

Id., at 227. (Quoting from 4 Am.Jur.2d, Appeal and Error, §242 at 737).

The New Jersey Supreme Court is similarly vigilant with respect to waivers of constitutional claims. In Brogan v. The Passaic Daily News, 22 N.J. 139 (1956), that court declined to rule on a constitutional challenge to N.J.S.A. 2A:81-10 (newspapermens' privilege against disclosure of source of published information) "in view of the fact that whatever immunity was conferred on the defendants by the statute was waived. . .," id. at 155, when the witness testified "as to the information he had received." Id., at 154. See also: Henry v. Mississippi, 379 U.S. 443 (1965).

Second, by ordering plaintiff to re-enact the "request-and-refusal" scenario that originally occurred between plaintiff and

Administrator Warren in November, 1979 (App. K, p. 20a; App. L, p. 21a), which refusal constitutes the basis for plaintiff's claim to "standing" in this action, the Appellate Division attempted to change the factual predicate underlying this action - seven (7) years after the two-year Statute of Limitations expired. N.J.S.A. 2A:31-3. Such an unprecedented re-enactment could create a new cause of action and would create a limitations problem which the suit does not now possess, particularly in view of the Appellate Division's election to "not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff. . ." (App. H, p. 14a). (The appellate court's citation to Wilson v. Dairymen's & c., Inc., 105 N.J.L. 188 (E. & A. 1928) is inapposite because the post-limitations amendment of the plaintiff's capacity from general administratrix to administratrix ad prosequendum was deemed a mere "correction of

a technical mistake," id., 143 A. at 455. The plaintiff was the same person and possessed fiduciary status from the commencement of the action. The case did not concern (as here) a fiduciary's refusal to file suit). Most likely, the controlling precedent would be Jarvis v. Johnson, 3 N.J. Misc. 777 (Sup. Ct. 1925), where the court, in allowing another amendment from Administratrix to Administratrix ad prosequendum, stated:

> This is not a situation where the suit was brought by one not possessing the requisite statutory qualifications. The plaintiff is the administratrix ad prosequendum. If she were not, she, of course, could not maintain this suit. Nor could she now acquire a status to proceed with the action for the reason that the two years' limitation within which such an action may be brought under the Death Act has expired. But her right to sue was acquired when she qualified as administratrix ad prosequendum and her suit was commenced within statutory time.

Id., at 778. (Emphasis added).

That the Appellate Division's remand terms

have, as their intended result, the mooting of plaintiff's federal claim through waiver is evidenced by the court's disregard of the fact that Phillips, by virtue of his being the successor in office to Administrator Warren, remains in privity with him. Phillips, therefore, as a matter of law, is bound by the original (1979) refusal of Administrator Warren to file this suit.[8] As succinctly stated by the Southern District of New York:

> Privity between persons denotes the relationship arising out of mutual rights or successive rights in the same property or interest, as, for example, successors in a particular office, or assignee and assignor, or executor and testator.

Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F.Supp. 413 (S.D.N.Y. 1967).

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[8] In its opinion, the Appellate Division attempted to exonerate Administrator Warren: "[Warren] declined to [file this action] on the ground that his appointment as administrator was for a limited purpose only." (App. H, p. 12a). However, the judgment appointing Warren, and his Letters of Administration, evidence a general, not a limited appointment. (App. I, p. 16a; App. J, p. 18a).

The final "springe," Davis v. Wechsler, 263 U.S. 22 (1923), set to enforce the statute against plaintiff, and guarantee the substitution of the Administrator, C.T.A., is found in the alternative remand term which provides that "if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff. . ." (App. H, p. 14a). (Emphasis added). With plaintiff's constitutional waiver having occurred in the first 30-day period, this "opportunity" would have remained the sole remedy. However, this novel procedural device of joining-a-defendant-in-order-to-make-him-a-plaintiff finds no support in the law. It represents a corruption of the Law of Trusts, wherein the "non-suing" trustee is joined as a defendant by the plaintiff-cestui que trust to remain a defendant and not to replace the cestui que as plaintiff.

Quoting from the New Jersey Court of Errors and Appeals:

> the only exception to the rule above stated [only a duly-appointed administrator is competent to sue, either at law or in equity] arises when, although there is an administrator, he neglects or refuses to prosecute suits for the recovery of his decedent's estate. In such case, the next of kin may sue * * * joining the personal representative as a party defendant.

Buchanan v. Buchanan, 75 N.J. Eq. 274, 71 A. 745, 748 (1909). See also: Niemaseck v. Bernett Holding Co., 125 N.J. Eq. 284 (Ch. Ct. 1939).

Third, and finally, plaintiff had in fact already complied with the remand terms in 1979 when he demanded that Administrator Warren file this suit and the latter refused. (See: App. K, p. 20a; App. L, p. 21a).

* * * * * *—

In Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561, 579-580 (1905), the U. S. Supreme Court held that the failure of the state court to pass on the federal right is not conclusive but that the Supreme Court will decide the federal question "if the

necessary effect of the judgment is to deny a Federal right * * * and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." The Supreme Court will particularly decide the federal question under circumstances where the "non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." Enterprise Irrig. Dist. v. Canal Co., 243 U.S. 157, 164 (1916). (Emphasis added). The jurisdiction of the Supreme Court where a state judgment is placed upon two grounds, one involving a federal question and the other not, is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment." Id., at 164. See also: Ward v. Love County, 253 U.S. 17 (1920); McCoy v. Shaw, 277 U.S. 302 (1927); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

An examination of the remand terms in the Appellate Division's 1986 decision reveal them to be neither "some ground of local or general law," Chicago B. & Q. R. Co., supra at 580, but instead a boilerplate compendium of conditions allegedly attempting to resolve the "standing" issue in this case. As such, they are "closely interwoven" with the standing issue under N.J.S.A. 2A:31-2 so "as not to be an independent matter to sustain the judgment." Abie State Bank, supra, at 773.

In its 1986 remand decision, the Appellate Division referred to its provisions as an "opportunity to plaintiff" - neglecting to mention that plaintiff is not seeking "opportunities," but is asserting an equal protection claim of right to standing for the purpose of receiving letters ad prosequendum. The distinction is an important one because the New Jersey Supreme Court is statutorily obligated to decide substantial questions arising under the U. S. Constitution.

By its action in denying plaintiff's petition for certification, and dismissing the appeal (App. A, p. 1a), the New Jersey Supreme Court violated the state constitution. Art. 6, §5, ¶1 of the New Jersey Constitution provides, in pertinent part, that:

> 1. Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> * * * * *
>
> (b) On certification by the Supreme Court. . .

In implementing Art. 6, §5, ¶1, the New Jersey Court Rules have added the additional qualification that the constitutional question be "substantial." R. 2:2-1(a)(1).

In the leading case of Tidewater v. Mayor and Council of Cartaret, 44 N.J. 328 (1965), the New Jersey Supreme Court established the guidelines for determining when a party may,

without grant of certiorari, appeal to the New Jersey Supreme Court in a case involving a constitutional question:

> there must appear indication of true merit from the constitutional point of view, i.e., that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination * * * Also, it should be noted that constitutional issues signifigant in the early development of a new area for such appeal purposes may become so settled through the course of judicial decisions as one day to become no longer worthy of a second review without leave. We conclude that cases falling into the type of this one are not appealable from the Appellate Division as of right.

Id., at 342-343. (Emphasis added). See also: In re Windsor Mun. Util. Auth. v. Shapiro, 57 N.J. 168, 170 (1970); Deerfield Estates, Inc., v. Tp. of East Brunswick, 60 N.J. 115, 119-120 (1972).

As a matter of record, there exists no prior decision in New Jersey courts adjudicating an equal protection challenge to N.J.S.A. 2A:31-2. Moreover, all previous interpretations

of this statute have construed this section to bar anyone, other than an executor or administrator, c.t.a., from maintaining a death action where the decedent dies testate. See: Schueler v. Strelinger, 43 N.J. 330 (1964). The "substantiality" of the equal protection issue in this appeal is evidenced in the analogous case of Schmoll v. Creecy, 54 N.J. 194 (1969) when the New Jersey Supreme Court allowed a second, as of right, appeal on an equal protection challenge to N.J.S.A. 2A:31-4, the "damages" section of the state's Wrongful Death statute:

> and an appeal was taken to us as of right * * * because of the constitutional issue whether the denial of relief to these children because of their illegitimacy offends the equal protection clause of the Federal Constitution.

Id., at 194. As succinctly stated in United States ex rel. Herring v. Fenton, 531 F.Supp. 937 (1981): "when there is an appeal of right on a federal constitutional question, the

Supreme Court of New Jersey has no discretion to decline to hear it. It is obliged to hear and decide it on the merits, by reason of N.J. Const. 1947, Art. 6, sec. 5, par. 1(a), quoted above. Neither the Legislature, by statute, nor the Supreme Court, by 'rule of practice and procedure,' can deny or degrade that State constitutional right." Id., at 946.

* * * * * *

In retrospect, it is apparent that the New Jersey courts have constructed nothing less than a 10-year obstacle course against plaintiff (see: Statement of Facts, infra), whose repeated attempts to secure letters ad prosequendum have encountered one detour and rejection after another - the courts all the while declining to decide the only question which could resolve the standing issue in the case: plaintiff's challenge to the constitutionality of N.J.S.A. 2A:31-2. The 1986 remand terms are not simply redundant but they are also

a cleverly-constructed "device to prevent a review of the decision upon the federal question," Enterprise Irrig. Dist. v. Canal Co., supra, at 164, by provoking a waiver of the federal claim. The remand terms are also insufficient to sustain the judgment as a matter of law. Id., at 164.

The Final Order of the New Jersey Supreme Court omits all reference to the federal issue, however, its order is as "much against the [constitutional] right * * * as if it had been specifically referred to and the right directly refused." Chapman v. Crane, supra, at 548. Consequently, the United States Supreme Court should accept jurisdiction of the within appeal. Plaintiff submits that if the constitutional issue were affirmatively confronted and decided, the result would require a different judgment in this appeal. Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, supra, at 579-580.

* * * * * *

The "public policy" necessity of deciding the federal question in this appeal is demonstrated by the ease with which a restrictive interpretation of N.J.S.A. 2A:31-2 in this case allowed "collusion" to surface between the personal representative and the defendants. See: Bailes, supra. In plaintiff's Statement of the Case, infra. he recounted how the Administrator secured an arrest warrant for plaintiff on September 21, 1978 and then waited a full year before executing it on September 23, 1979, having plaintiff jailed for 4 days on a spurious contempt charge in order to gain possession of his mother's will, all the while plaintiff was still appealing this fiduciary's appointment.

Can anyone seriously doubt that the real purpose behind this well-executed scheme was to prevent the filing of this suit by removing decedent's will from plaintiff's possession and then excluding him from serving as executor? Particularly, when the probate was con-

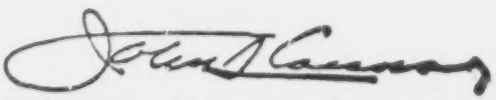
veniently delayed until 10 days after this suit had to be filed. These actions bespeak a pervasive conspiracy to defeat this suit by creating a legal "limbo" in which, at the precise moment limitations were to expire, an estate legally adjudged "intestate" was in process of becoming "testate" with an Administrator being replaced by an Administrator, C.T.A., after the former refused to file this suit.

This type of conduct can never be allowed to pass.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal. However in the event this Court's appellate jurisdiction under 28 U.S.C. §1257(2) is not appropriate here, Appellant requests review by writ of certiorari under 28 U.S.C. §1257(3). See: 28 U.S.C. §2103.

Respectfully submitted,



John R. Connor, Pro se

Dated: 1 August, 1989

APPENDIX "A"

(Filed: May 4, 1989)

SUPREME COURT OF NEW JERSEY
C-966 September Term 1988
29,896

IN THE MATTER OF:

JOHN R. CONNOR, etc.,

Plaintiff-Petitioner,

vs.

R.G. SACHS, M.D., et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-5250-87T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied; and it is further

ORDERED that the notice of appeal filed in the within matter is dismissed pursuant

to Rule 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of May, 1989.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "B"

(Filed: May 23, 1989)

SUPREME COURT OF NEW JERSEY
M-1256 September Term 1988

29,896

In The Matter Of:

JOHN R. CONNOR, etc.,

Plaintiff-Movant, ORDER

vs.

R. G. SACHS, M.D., et al.,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion to require the Clerk to mark as "file" [sic] Appellate Division briefs received in the Supreme Court is dismissed as moot, certification having been denied (C-966-88). The record before the Court on the petition included the Appellate Division briefs and Appendices of the parties pursuant to Rule 2:12-6.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 16th day of May, 1989.

/s/Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "C"

(Filed: Dec. 13, 1988)

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5250-87T5
MOTION NO. M-1466-88
BEFORE PART: C
JUDGE(S): PETRELLA
SHEBELL
GRUCCIO

JOHN R. CONNOR, etc, et al

-vs-

R.G. SACHS, MD, et al

MOTION FILED: November 14, 1988
ANSWER(S) FILED: November 28, 1988

SUBMITTED TO COURT: November 30, 1988

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 9th DAY OF December, 1988, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT OVERLOOK HOSPITAL TO DISMISS APPEAL AND FOR FURTHER RELIEF:

GRANTED/OTHER

SUPPLEMENTAL:

The motion is granted. The decision below is now final as to all parties and issues. Clearly, appellant has not complied with the options afforded in our May 29, 1986 opinion in Docket No. A-3491-83. Moreover, that opinion is fully binding on all the parties.

In addition, we find the April 8, 1988 letter opinion of Judge Wecker with respect to the individual defendants persuasive as to the present motion for dismissal by Overlook Hospital. The appeal is dismissed as clearly without merit, R. 2:11-3(e)(1)(E), and because our prior opinion is in effect the law of the case. See State v. Hale, 127 N.J.Super. 407 (App. Div. 1974) and R. 2:8-2.

FOR THE COURT:

/s/James J. Petrella
JAMES J. PETRELLA, P.J.A.D.

S/G/M/Dismiss on substantive grounds; see order for holding (JJP)

Close A as dismissed

APPENDIX "D"

(Filed May 16, 1988)

SHANLEY & FISHER, P.C.
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000
Attorneys for Defendants Sachs, Inglesby, Belladonna, Murray & Wittmann

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
UNION COUNTY
DOCKET NO. L-14573-79

JOHN R. CONNOR, Beneficiary et als.,	Civil Action
Plaintiffs,	ORDER
vs.	
R.G. SACHS, M.D., et als.,	
Defendants.	

These matters having been presented to the Court, and this Court having considered the pleadings, documents, briefs and arguments of counsel, and for cause shown as more fully set forth in this Court's Letter Opinion of April 8, 1988, and for the further reasons set forth in its May 16, 1988 letter in response to plaintiff's objections,

It is on this 16th day of May, 1988

ORDERED as follows:

1. The plaintiff's application for the issuance of letters ad prosequendum be and is hereby denied.

2. The plaintiff's cross-motion for a declaratory judgment that N.J.S.A. 2A:31-2 is unconstitutional be and is hereby denied.

3. The defendant's motion to dismiss the complaint for failure to comply with the terms of the Appellate Division remand be and is hereby granted; and the complaint filed herein as to the defendants Sachs, Inglesby, Belladonna, Murray, and Wittmann be and the same is hereby dismissed with prejudice and without costs.

/s/ Barbara Byrd Wecker
Barbara Byrd Wecker, J.S.C.

APPENDIX "E"
(Filed: January 26, 1987)

SUPREME COURT OF NEW JERSEY
M-496 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Movant,	:	
	:	ORDER
vs.	:	
	:	
R. G. SACHS, M. D., et al.,	:	
	:	
Defendants-Respondents.	:	
	:	

This matter having been duly presented to the Court, it is ORDERED that the plaintiff's motion for reconsideration of this Court's order of December 18, 1986 dismissing the appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of January, 1987.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

APPENDIX "F"
(Filed: December 18, 1986)

SUPREME COURT OF NEW JERSEY
M-334 SEPTEMBER TERM 1986

26,036

JOHN R. CONNOR, etc.,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	ORDER
	:	
R. G. SACHS, M.D., et al.,	:	
	:	
Defendants-Movants.	:	

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal (A-138) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

APPENDIX "G"

(Filed: July 1, 1986)

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3491-83T3
MOTION NO. M-4504-85
BEFORE PART G

JUDGES: FURMAN
PETRELLA
COHEN

JOHN R. CONNOR, Beneficiary and
Executor-designate of the Estate
of Mary A. Connor, etc

vs

R. G. SACHS, M. D., ET AL

MOVING PAPERS FILED June 11, 1986
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT June 24, 1986
DATE ARGUED
DATE DECIDED June 27, 1986

THIS MATTER HAVING BEEN DULY PRESENTED

TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR RECONSIDERATION D E N I E D

FOR THE COURT:

/s/ David D. Furman, P.J.A.D.
DAVID D. FURMAN P.J.A.D.

WITNESS, THE HONORABLE DAVID D. FURMAN, PRESIDING JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 27 DAY OF JUNE 1986.

/s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

APPENDIX "H"

(Filed: May 29, 1986)

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3491-83T3

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff-Appellant,

v.

R.G. SACHS, M.D., T.V. INGLESBY, M.D., J.A. BELLADONNA, M.D., N.L. MURRAY, M.D., C.J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Defendants-Respondents.

Argued April 28, 1986 - Decided May 29, 1986

Before Judges Furman, Petrella and Cohen.

On appeal from the Superior Court, Law Division, Union County.

John R. Connor, appellant, argued pro se.

Mark D. DiGidio argued the cause for respondents R.G. Sachs, M.D., T.V. Inglesby, M.D., J.A. Belladonna, M.D., N.L. Murray, M.D., and C.J. Wittman, Jr., M.D. (Shanley & Fisher, attorneys; Thomas J. Alworth and Mark W. Lynch, on the brief).

R. Scott Eichorn argued the cause for respondent Overlook Hospital (McDonough, Murray and Korn, attorneys; Robert J. Logan, on the brief).

PER CURIAM

Plaintiff appeals pro se from the dismissal on motion of his wrongful death action on behalf of the beneficiaries of his mother's estate and from the denial of his cross-motion to declare N.J.S.A. 2A:31-2 unconstitutional or, alternatively, to substitute Lucas E. Phillips, Jr., administrator of his mother's estate, as party plaintiff.

Plaintiff instituted this action on November 21, 1979, within two years of his mother's death on November 24, 1977. He had been named executor in her will but had not qualified. An administrator had been appointed to submit plaintiff's mother's will for probate. Plaintiff requested the administrator to file this wrongful death complaint. He declined to do so on the ground that his appointment as ad-

ministrator was for a limited purpose only. The will was probated and Phillips appointed on December 4, 1979.

We need not reach the constitutional issue raised by plaintiff that N.J.S.A. 2A:31-2 violates equal protection of the law because of its differing standards for who may bring claims on behalf of testate and intestate estates: if a decedent has died testate, only the executor or administrator c.t.a. may prosecute a wrongful death action on behalf of his estate; if a decedent has died intestate, anyone beneficially interested may be appointed administrator ad prosequendum.

The trial court denied plaintiff's cross-motion to substitute Phillips in his stead as plaintiff on the sole ground that plaintiff had "presented no evidence that Lucas Phillips is now the administrator." At oral argument we were informed that Phillips is still serving as administrator c.t.a.; he has never formally

declined to be substituted as plaintiff or to maintain the wrongful death action.

Accordingly, we reverse the dismissal of plaintiff's complaint, which was based upon his lack of standing under N.J.S.A. 2A:31-2. We remand to provide an opportunity to plaintiff, within 30 days of the date of our remand, to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum.

We do not resolve issues which may be raised on remand: whether the Statute of Limitations may be raised as a defense if Phillips is substituted as plaintiff, see Wilson v. Dairymen's, & c., Inc., 105 N.J.L. 188 (E. & A. 1928) holding that a defendant is not preju-

diced in an action brought within the Statute of Limitations by the substitution of the proper party plaintiff after the expiration of the two-year period of limitations; whether appointment as administrator ad prosequendum of a person beneficially interested, upon refusal of Phillips to be substituted as plaintiff, is within the trial court's authority as an implicit exception to N.J.S.A. 2A:31-2; or, if not, whether, N.J.S.A. 2A:31-2 is unconstitutional.

We reverse and remand in accordance herewith. We do not retain jurisdiction.

APPENDIX "I"

JUDGMENT OF THE SUPERIOR COURT,
CHANCERY DIVISION, ESSEX COUNTY
Docket No. P-392-77
(Filed: May 26, 1978)

In the matter of

THE ESTATE

OF

MARY A. CONNOR, DECEASED.

Before:
DWYER, Chancery Judge.

DWYER, Chancery Judge:

It appearing by the complaint of Hannoch, Weisman, Stern & Besser, Esqs., that Mary A. Connor, late of the County of Essex and State of New Jersey, died on November 24, 1977, intestate; and it further appearing that due notice of the application of the plaintiff has been given to all of the competent adult

next of kin entitled to administration upon the estate of the said intestate, whose right thereto is prior or equal to that of the plaintiff.

It is thereupon on this 25th day of May, 1978, adjudged that letters of administration upon the estate of the said Mary A. Connor be granted to George Warren, Esq., upon his giving bond to the Superior Court of New Jersey in the sum of $5,000.00, conditioned according to law, and with sureties to be approved by this court which amount shall be received upon the filing of the inventory.

/s/ Arthur C. Dwyer
ARTHUR C. DWYER, J.S.C.

APPENDIX "J"

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
ESSEX COUNTY
P-392-77
(Filed: Jul 20, 1978)

In the Matter of the	Civil Action
Estate of MARY A. CONNOR, Deceased.	LETTERS OF ADMINISTRATION

I, W. Lewis Bambrick, Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby certify that by Judgment of the Superior Court of New Jersey, dated May 25, 1978, George Warren was appointed Administrator of the Estate of Mary A. Connor, deceased, late of the County of Essex. The said Administrator has filed his acceptance and duly qualified on July 19, 1978,
And on the 19th of July, 1978, was duly authorized to execute the said estate according to law, as reference to the file in this office will more fully and at large appear.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Trenton, this 20th day of July, 1978.

(SEAL)

/s/ W. Lewis Bambrick
Clerk

APPENDIX "K"

380 Wyoming Avenue
Millburn, New Jersey 07041
15 November, 1979

Mr. George Warren, Esq.
112 Nassau Street
P. O. Box 645
Princeton, N. J. 08540

Re: Complaint for Wrongful Death
of Mary A. Connor

Dear Mr. Warren:

Enclosed herewith is a complaint for wrongful death which I am ordering you to sign, date and file immediately with the Clerk of the Superior Court, in accordance with the applicable rules.

Under N.J.S.A. 2A:31-2 it is your duty to file this complaint and it must be filed prior to November 24, 1977.

I order you to sign it immediately, upon its receipt, and I enclose my check in the amount of $60.00 for filing fees.

Furthermore, be advised that, in the event Justice Gaulkin allowed you to resign in court yesterday, I will appeal that decision.

Please be guided accordingly.

Sincerely,

/s/ John R. Connor
John R. Connor

Encl:

APPENDIX "L"

LAW OFFICES
GEORGE WARREN

112 Nassau Street
P.O.Box 645
Princeton, New Jersey 08540
(609) 924-8900
(609) 394-7141

November 16, 1979

Mr. John R. Connor
380 Wyoming Avenue
Millburn, New Jersey 07041

Re: Complaint for Wrongful Death of Mary A. Connor

Dear Mr. Connor:

I am having difficulty in sorting out your motive in the type of communications you have been addressing to me including your most recent letter dated November 15 with the accompanying "Complaint for Wrongful Death." Under date of November 10, in a letter to Judge Gaulkin withdrawing your Order to Show Cause, you again attack the Order appointing me. Despite that, five days later, you send me a letter in which you say it is my "duty" to file a complaint on behalf of your late mother in a capacity as "Plaintiff-Administrator." The conflict in your position should be apparent to you.

[material omitted]

I point out to you that the two year statute of limitations on negligent actions may have expired in your mother's case and most

certainly will expire on the current anniversary of your mother's death which I believe was the 24th of this month. If there is any basis for a Complaint in negligence, it will have to be filed almost immediately. In view of the situation, created basically by your own actions, I can only suggest that you immediately bring this problem to the attention of competent counsel so that a proper Complaint can be filed within the next week. The Complaint you forwarded me and your check payable to the Clerk of the Superior Court in the sum of $60.00 are herewith returned.

Very truly yours,

/s/ George Warren
George Warren

GW:ad
Encls.

APPENDIX "M"

(Filed: April 15, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER

JOHN CONNOR, et als., :

Plaintiffs, :

-vs- :

R. G. SACKS, et als., :

Defendants. :

JUDGE: Honorable Harry V. Osborne, Jr.

DATE: Friday, March 25, 1983.

PARTIES PRESENT OR REPRESENTED: John R. Connor, pro se, plaintiff and Robert L. Logan, Esq. (McDonough, Murray & Korn, P.A.)

ORDERED: 1. That plaintiff, John R. Connor shall qualify as administrator ad prosequendum of the Estate of Mary A. Connor within 20 days of the date of this order.

2. If plaintiff fails to qualify as administrator ad prosequendum within this time period, the plaintiff's complaint is dismissed for lack of standing.

3. That a copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this order.

4. Plaintiff's cross motion for a stay pending decision of an appeal in Connor v. Besser et al is denied.

/s/ Harry V. Osborne Jr.
Honorable Harry V. Osborne, Jr.
Judge of the Superior Court

Dated: April 13, 1983

APPENDIX "N"

(Filed: May 2, 1983)

Docket No. 12,923 J

ESSEX COUNTY SURROGATE'S COURT

ADJUDICATION THAT DOUBTS AND DIFFICULTIES ARISE ON COMPLAINT FOR ADMINISTRATION AD PROSEQUENDUM

In the matter of the estate)
)
of Mary A. Connor)
)
deceased)

On Complaint for Administration Ad Prosequendum of John R. Connor, son of the deceased, and it being shown that the Last Will and Testament of Mary A. Connor was probated by an Order of the Superior Court of New Jersey, Chancery Division - Essex County dated December 3rd, 1979 and Lucas E. Phillips, Jr., Esq., was appointed Administrator with the Will Annexed:

It is thereupon on this 2nd day of May, 1983, pursuant to the statute in such case made and provided adjudged that difficulties arise upon the appointment of the said Com-

plainant.

NICHOLAS R. AMATO
Surrogate

By: /s/ Barbara J. DeBartola
Special Deputy Surrogate

APPENDIX "O"
(Filed: June 7, 1983)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

JOHN R. CONNOR, et als,	:	Civil Action
Plaintiffs,	:	ORDER
vs.	:	
R. G. SACHS, M.D., et als,	:	
Defendants.	:	

This matter having been opened to the Court by the plaintiff pro se, John R. Connor, in the presence of Shanley & Fisher, P. C., by Thomas J. Alworth, Esq. and McDonough, Murray & Korn, Esqs., by Stephanie Briody, Esq., and the Court having considered the moving papers, supporting documentation and the arguments of counsel, and for cause shown

It is on this 6th day of June, 1983

ORDERED that plaintiff's motion for the entry of an order granting Letters Ad Prosequendum to the plaintiff be and the same is

hereby denied.

IT IS FURTHER ORDERED that the plaintiff, John R. Connor, shall apply to the Superior Court, Probate Part, Essex County, on or before June 17, 1983 for an Order granting Letters Ad Prosequendum to the plaintiff.

IT IS FURTHER ORDERED that further proceedings in this matter shall be stayed pending a resolution by the Superior Court, Probate Part, Essex County, of the aforementioned application to be initiated by John R. Connor.

IT IS FURTHER ORDERED that upon resolution of the matter to be filed in the Superior Court, Probate Part, Essex County, any of the parties hereto may then seek whatever relief they deem appropriate from this court.

/s/ Harry V. Osborne, Jr.
Harry V. Osborne, J.S.C.

APPENDIX "P"

ESSEX COUNTY SURROGATE'S COURT
Hall of Records
Newark, N. J. 07102

June 30, 1983

John R. Connor, Pro se
380 Wyoming Avenue
Millburn, NJ 07041

RE: In the matter of the Estate of
Mary A. Connor

Dear Mr. Connor:

The law of the State of N.J. does not provide for the appointment of an administrator ad prosequendum for any person dying testate.

Accordingly, Judge Thompson has directed that your mailing, dated June 17, 1983, which was received by the Surrogate on June 28, 1983, be returned to you.

Please find said mailing enclosed, including your check for $20.00.

Very truly yours,

NICHOLAS R. AMATO, SURROGATE

/s/George R. Boutillier
By:George R. Boutillier
Assignment Clerk

GRB/pt

APPENDIX "Q"

(Filed: February 14, 1984)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION UNION COUNTY

Docket No. L-14573-79

CIVIL ACTION

ORDER

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor and for the ADMINISTRATOR of the Estate of Mary A. Connor, for the benefit of Thomas B. Connor, Sr., Thomas B. Connor, Jr., John R. Connor, Robert L. Connor and Carol Moken,

Plaintiff(s)

v.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N.L. MURRAY, M.D., C. J. WITTMAN, JR., M. D. and OVERLOOK HOSPITAL,

Defendant(s)

This matter having been brought before the Court on motion of Shanley & Fisher, P. C., attorneys for defendants Sachs, Inglesby, Belladonna, Murray and Wittman for an Order dismissing the Complaint with prejudice due

to the plaintiff's lack of standing, and the Court having considered the matter and good cause appearing,

It is on this 10th day of February, 1984, ORDERED

that the Complaint filed herein be and the same is hereby dismissed with prejudice and without costs, as to all defendants.

/s/ Harry V. Osborne, J.
Harry V. Osborne, J.S.C.

APPENDIX "R"

(Filed: September 12, 1986)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. L-14573-79

CIVIL ACTION
(Medical Malpractice)

ORDER GRANTING SUMMARY JUDGMENT ON BEHALF OF DEFENDANT, OVERLOOK HOSPITAL, OR, IN THE ALTERNATIVE, DISMISSING PLAINTIFFS' COMPLAINT

JOHN R. CONNOR, Beneficiary and Executor-designate of the Estate of Mary A. Connor, etc., :

Plaintiffs, :

-vs- :

R. G. SACHS, M.D., et als, :

Defendants. :

JUDGE:

DATE OF MOTION: Friday, September 12, 1986, at 9:00 a.m.

PARTIES PRESENT OR REPRESENTED: None. The matter was submitted on the papers.

ORDERED: 1. That summary judgment is hereby granted in favor of defendant, Overlook Hospital.

2. Plaintiffs' Complaint is hereby

dismissed for failure to comply with the decision of the Appellate Division filed on May 29, 1986.

3. A copy of this Order shall be served upon attorneys for all parties within 7 days of the date of this Order.

FOR THE REASONS SET FORTH
BY THE COURT ON THE RECORD
ON Sept 12, 1986

/s/ Leonard S. Sachar
LEONARD S. SACHAR
J.S.C.

DATE OF
ORDER: 9-12-86

APPENDIX "S"

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL
DOCKET NO. L-14573-79

JOHN R. CONNOR, :
Plaintiff, :
-vs- :
SACHS, et al, :
Defendant. :
- - - - - - - - - - - -

TRANSCRIPT OF
PROCEEDINGS

Motion

Friday, September 12, 1986
Union County Courthouse
Elizabeth, New Jersey

ORDERED BY:
JOHN R. CONNOR, pro se

BEFORE:
THE HONORABLE LEONARD R. SACHAR, J.S.C.

APPEARANCES:

JOHN R. CONNORS, pro se

MESSRS. McDONOUGH, MURRAY & KORN
Attorneys for Overlook Hospital
By: MELINDA FABRICANT, ESQ.

ANDREA MR. SANNIOLA
Official Court Reporter
License No. X101097

(Partial transcript)

[23] THE COURT: . . . In addition, the Court finds that the Appellate Division has set forth its conditions for the plaintiff to avail himself of requests to continue [24] and to have standing, that it was understood by the plaintiff that the plaintiff has chosen not to pursue the direction of the Appellate Division, has not secured a stay. Accordingly, it's this Court's finding that the complaint, even if it had not been dismissed by the Court, which it is on summary judgment, that there would not be a standing by this plaintiff to go forward, or failure to show that it had standing or had complied with the Appellate Division pre-requisites to obtain standing has not pursued the course open to the plaintiff to pursue standing and acquired standing and, therefore, has waived and is estopped from any further claim of standing in this matter by its own conduct. Therefore, the order of the defendant Overlook Hospital will be signed.

APPENDIX "T"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 22, 1987

Mr. John R. Connor
380 Wyoming Avenue
Milburn, N.J. 07041

Re: John R. Connor,
v. R. G. Sachs, et al.
No. 86-1727

Dear Mr. Connor:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction.

Very truly yours,

Joseph F. Spaniol, Jr.,
Clerk

/s/ Joseph F. Spaniol, Jr.

APPENDIX "U"

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 26, 1987

Mr. John R. Connor
380 Wyoming Avenue
Milburn, N. J. 07041

Re: John R. Connor,
v. R. G. Sachs, et al.
No. 86-1727

Dear Mr. Connor:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

/s/ Joseph F. Spaniol

APPENDIX "V"

380 Wyoming Avenue
Millburn, New Jersey 07041
6 September, 1987

John H. Watson, Jr., Esq.
63 Washington Street
East Orange, New Jersey 07017

Re: Estate of Mary A. Connor

Dear Mr. Watson:

Would you please advise whether or not you are still representing Lucas Phillips, Jr. as Administrator, C.T.A. of the above Estate and, if not, and in any event, where Mr. Phillips can be reached.

Sincerely,

/s/John R. Connor
John R. Connor

APPENDIX "W"

[Certified R/R/R]

380 Wyoming Avenue
Millburn, New Jersey 07041
16 September, 1987

John E. Watson, Jr., Esq.
63 Washington Street
East Orange, New Jersey 07017

Re: Estate of Mary Agnes Connor

Dear Mr. Watson:

I would appreciate your reply to my letter to you of September 6, 1987 advising if you still represent Lucas Phillips as Administrator, C.T.A., of my mother's estate, and where Mr. Phillips can be reached.

Sincerely,

/s/John R. Connor
John R. Connor

APPENDIX "X"

380 Wyoming Avenue
Millburn, New Jersey 07041
24 September, 1987

Lucas E. Phillips, Jr., Esq.
312 Orange Road
Montclair, New Jersey 07042

Re: Connor v. Sachs, et als,
Docket No. A-3491-83T3

Dear Mr. Phillips:

Enclosed please find a copy of the Appellate Division's judgment in the above matter, the appeals of which to higher courts have now been concluded. Please note the highlighted terms of remand on page 3.

So that there is no misunderstanding my position, I herein request that you decide not to substitute for me as plaintiff in this litigation, as it will probably create a limitations problem. Furthermore, inasmuchas you remain in privity with your predecessor administrator, George Warren, you would consequently be bound by his 1979 refusal to file this suit. (See: attached letter dated November 16, 1979 from Warren to myself, page 2).

This letter is without prejudice to my own claim to standing in this suit.

In the event you desire further information, please advise.

Sincerely,

/s/John R. Connor
John R. Connor

Letter of 9/24/87 Cont'd:

Encl:

cc: John H. Watson, Jr., Esq.

P.S. Please advise whether Mr. Watson still represents you on my mother's estate, as he fails to reply to my inquiries.

APPENDIX "Y"

SUPERIOR COURT OF NEW JERSEY

April 8, 1988

John R. Connor
380 Wyoming Avenue
Millburn, NJ 07041

Thomas Alworth, Esq.
Shanley & Fisher
131 Madison Avenue
Morristown, NJ 07960

Re: Connor v. Sachs, et als.
Docket No. L-14573-79

Dear Mr. Connor and Mr. Alworth:

As I indicated in my tentative decision on November 13, 1987, I have determined that plaintiff's complaint should be dismissed for failure to comply with the express instructions of the Appellate Division in its May 29, 1986 decision. In that decision, the Appellate Division reversed a prior trial court's dismissal of plaintiff's complaint, which dismissal was based upon plaintiff's lack of standing under N.J.S.A. 2A:31-2. That statute provides:

> PERSONS ENTITLED TO SUE OR MAKE CLAIM
>
> Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

[Page 2]

Plaintiff was named in his mother's will as executor of her estate. However, as the

Appellate Division stated in its May 29, 1986 decision, he did not qualify. See Order signed by Judge Gaulkin, dated December 3 and filed December 4, 1979. An administrator was appointed by the court to probate the will, and subsequently Lucas E. Phillips, Jr., Esq. was appointed as general administrator of the Estate.

In 1984, another trial court granted defendant's motion to dismiss plaintiff's complaint for lack of standing. See order signed by Judge Osborne, dated February 10 and filed February 14, 1986. The Appellate Division reversed that dismissal on May 29, 1986, in a per curiam opinion, remanding

> . . .to request Phillips to substitute as party plaintiff and to maintain the wrongful death action and to provide a further opportunity if Phillips refuses, within 30 days thereafter, to join Phillips as a party defendant in order to compel his substitution as plaintiff or alternatively, to appoint the present plaintiff as administrator ad prosequendum.

Plaintiff filed an appeal with the New Jersey Supreme Court which was dismissed on December 18, 1986. Plaintiff's attempted appeal of the New Jersey Supreme Court decision was thereafter dismissed for want of jurisdiction on June 22, 1987 and rehearing was denied on August 26, 1987.

[Page 3]

Plaintiff never sought a stay of the May, 1986 Appellate Division decision. Nevertheless, this trial court gave him the benefit of the doubt, so to speak, and found that the pendency of plaintiff's several attempts to overturn that decision tolled the

time within which he had to act in order to comply with the decision. See Order for Stay and Order for Dismissal, each filed January 30, 1987.[1]

Thus under this Court's finding, plaintiff had until September 25, 1987, which is 30 days after the United States Supreme Court's denial of plaintiff's last available appellate remedy, to comply with the Appellate Division's decision, in order to avoid dismissal of the within Complaint. It is noteworthy that plaintiff did not report to this Court the August 26, 1987 final disposition (dismissal) of his appeal until October 9, 1987, when he filed a notice of motion for

> . . .an order granting letters ad prosequendum to the plaintiff in this action and also to move plaintiff's pending cross-motion for a Declaratory Judgment adjudging N.J. S.A. 2A:31-2 in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.
>
> [Page 4]

Even more signifigant is plaintiff's September 24, 1987 letter request to the administrator, Lucas E. Phillips, Esq. That letter is written one day before the expiration of the previously tolled 30-day time period allowed by the Appellate Division. However, instead of following the Appellate Division's very clear instructions, the

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[1] Copies of those Orders are attached. One Order denies defendant's motion to dismiss for failure to comply with the Appellate Division decision. The other Order stays the suit pending final disposition by the United States Supreme Court.

plaintiff enclosed for Mr. Phillips a copy of that decision, with the "terms of remand on page 3" "highlighted," and explicitly requested the administrator "not to substitute for me as plaintiff in this litigation . . ." See Letter of September 24, 1987 (Appendix F to plaintiff's October 9, 1987 Notice of Motion).

Plaintiff chose deliberately not to avail himself of the opportunity given him by the Appellate Division to prevent dismissal of the Complaint by either (a) requesting the voluntary substitution of Phillips (the administrator) as plaintiff in conformity with the express provision of N.J.S.A. 2A:31-2; or "if Phillips refuses . . . to compel his substitution as plaintiff or, alternatively, to appoint the present plaintiff as administrator ad prosequendum." [2]

Whatever the reasons for plaintiff's course of action, a full and careful review of the lengthy procedural history of this

[Page 5]

litigation leads but to one conclusion. Plaintiff has closed the door upon himself. Having explicitly requested the administrator not to participate in the action as plaintiff (which would have satisfied N.J.S.A. 2A:31-2 and allowed the case to proceed on its merits) Connor cannot be heard to complaint that that Statute is unconstitutional, since by definition he has not shown that it affects him. In other words, he has denied himself standing to raise the constitutional

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[2] The Appellate Division explicitly declined to decide if such appointment "is within the trial court's authority as an implicit exception to N.J.S.A. 2A:31-2; or, if not, whether, N.J.S.A. is unconstitutional."

question. [3]

For all of these reasons plaintiff's complaint against the several doctor defendants is dismissed with prejudice.

Very truly yours,

/s/ Barbara Byrd Wecker
BARBARA BYRD WECKER
J.S.C.

BBW:smh
enclosure
cc: Robert Logan, Esq. (w/enclosure)

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[3] I find no evidence that Connor has ever complied with R. 4:28-4(a), which requires notice to the Attorney General whenever a statute's constitutionality is challenged in a suit to which the State is not a party.

[Attachments omitted]

APPENDIX "Z"
(Filed: July 14, 1989)

IN THE SUPREME COURT OF NEW JERSEY
DOCKET NO. 29,896/A-5250-87T5

JOHN R. CONNOR,

Appellant,

vs.

R. G. SACHS, M.D., T. V. INGLESBY, M.D., J. A. BELLADONNA, M.D., N. L. MURRAY, M.D., C. J. WITTMAN, JR., M.D. and OVERLOOK HOSPITAL,

Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

NOTICE IS HEREBY GIVEN that John R. Connor, Appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order entered in this matter on May 4, 1989, denying Petitioner-Appellant's petition for certification and dismissing the appeal

filed in this matter with the New Jersey Supreme Court.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/John R. Connor
John R. Connor, Pro se
380 Wyoming Avenue
Millburn, New Jersey 07041
(201) 762-5587

Dated: 12 July, 1989

Certificate of Service

I hereby certify that a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was mailed by me this 13th day of July, 1989, via first-class mail, postage prepaid, to: Robert J. Logan, Esq., McDonough, Murray & Korn, 555 Westfield Avenue, Westfield, New Jersey 07091 (counsel for defendant Overlook Hospital); Thomas J. Alworth, Esq., Shanley & Fisher, P.C., 131 Madison Avenue, Morristown, New Jersey 07960 (counsel for defendant physicians); and the Attorney General of New Jersey, Attn: James J. Ciancia, Esq., Assistant Attorney General, Office of the Attorney General, Hughes Justice Complex, Trenton, New Jersey 08625.

/s/John R. Connor
John R. Connor, Pro se

Dated: 13 July, 1989